No. 422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

OFFICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 11, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, ET AL., TO INTERVENE OR IN THE ALTERNATIVE FOR LEAVE TO FILE REPLY BRIEF AND PRESENT ORAL ARGUMENT AS AMICI CURIAE

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The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO; Local No. 223, Grocery, Meat, Motorcycle and Miscellaneous Drivers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO; Warehousemen Local No. 206, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Ware-

housemen and Helpers of America, AFL-CIO; Joint Council of Drivers, No. 37, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO; Teamsters Building Association, Inc., a non-profit corporation; Oregon Teamsters' Security Plan Office; William C. Earhart, individually and as administrator of the Oregon Teamsters' Security Plan Office, each moves this Honorable Court for leave to intervene herein as a party for the purpose of urging that the judgment below be affirmed, and in support of such motion states:

1. Each of the applicants for intervention was named as a party respondent charged with the commission of unfair labor practices in violation of Section 8 (a) of the National Labor Relations Act (29 U.S.C.A. 158(a)) in one or more of four complaints issued by the General Counsel of the National Labor Relations Board in six different cases instituted before the Board by charges filed by the petitioner, Office Employes International Union, Local No. 11, AFL-CIO.[1] The National Labor Relations Board dismissed all of these complaints upon jurisdictional grounds, *sub nom Matter of Oregon Teamsters' Security Plan Office,* 113 NLRB 987 (R. 229a-236a). The court below affirmed the Board's order of dismissal in an opinion reported in 235 F. 2d 832 (R. 261-266). This Court

[1] Since the decision in the court below one of the respondents named in the complaints issued by the General Counsel of the National Labor Relations Board, namely, John J. Sweeney, an agent of the International Brotherhood of Teamsters, has died. With respect to the issues of jurisdiction which are before this Court John J. Sweeney stood in no different position than the five applicants for intervention other than the Oregon Teamsters' Security Plan Office and William C. Earhart, administrator thereof.

granted certiorari on November 13, 1956 (352 U.S. 906.)

2. Each of the applicants for intervention will again be subjected to proceedings before the National Labor Relations Board by the judgment of this Court should it grant the relief requested by the petitioner, namely, to reverse the judgment below and remand the case to the Board "with directions for it to assume jurisdiction of the complaints and make findings on the substantive issues in this matter" (Brief for Petitioner, p. 28). In further proceedings before the Board the applicants for intervention could be subjected to, among other things, the payment of back pay, reinstatement of certain workers, and other orders which would substantially affect the rights of the applicants for intervention.

3. Upon the filing by the National Labor Relations Board of its brief in this Court on February 21, 1957, the applicants for intervention herein learned for the first time that instead of defending its order the Board itself suggests that it may be appropriate for this Court to set aside the Board's order and remand the case to the Board for reasons never before raised in this case by any party either before the Board or in the court below or in this Court (Brief for the National Labor Relations Board, pp. 15-16, 41-42). The Board in its brief here ignores completely the determinative finding of two of the three Board members who joined in the order of the Board dismissing the complaints, namely, the finding of then Chairman Farmer and then Board member Peterson "that the initial requirement for assertion of Board jurisdiction over the operations of the Respondents—effect upon commerce within the meaning of the Act—has not been estab-

lished" (R. 234a). The Board in its brief here argues that the third Board member who joined in the dismissal order, namely, Board Member Murdock, who held that none of the applicants for intervention is an employer within the meaning of National Labor Relations Act (R. 236a-239a), was in error in so holding (Brief for N.L.R.B., pp. 12-13, 17-21). The Board suggests that if this Court agrees that Board Member Murdock proceeded on an erroneous basis, the Court may properly remand the case to the Board, without considering the validity of the reasons which motivated then Chairman Farmer and then Board Member Peterson to join in the dismissal order because the two did not constitute a majority of the five man Board which sat in this case (Brief for N.L.R.B., pp. 15-16, 41-42). It was never urged before the Board nor in the court below nor did the petition for a writ of certiorari present any question as to the effect upon the validity of the Board's order of the lack of agreement between the members of the Board or of any error in the reasons assigned by only one of those who joined in the order of dismissal.

4. There appears to be no way in which this Court could dispose of this case without entering a judgment which would be binding on each of the applicants for intervention. Since there is no party before the Court which is representing the position of the applicants for intervention, they are entitled as of right to intervene here and be heard in their own behalf. *United States* v. *Terminal Association of St. Louis*, 1915, 236 U.S. 194, 199. If the judgment below should be reversed here without the applicants for intervention having been heard as parties and without any other party representing their interest, they will be deprived

of due process of law in violation of the Fifth Amendment to the Constitution of the United States. Cf. *Consolidated Edison Co.* v. *N.L.R.B.*, 1938, 305 U.S. 197, 218, 233-234; *L. B. Wilson, Inc.* v. *F.C.C.*, D.C. Cir., 1948, 170 F. 2d 793, 802-803; *Wolpe* v. *Poretsky*, D. C. Cir., 1944, 144 F. 2d 505, 507-508, certiorari denied, 323 U.S. 777. A hearing at each appellate level at which a binding determination is made by a court is as much an attribute of due process as a hearing before a trial court or an administrative agency. The right to be heard in oral argument must be granted to all parties who may be adversely affected where it is granted to the prevailing party. Cf. *Londoner* v. *Denver*, 1908, 210 U.S. 373; *L. B. Wilson, Inc.* v. *F. C. C., supra*, 170 F. 2d at 805.

5. The position of the applicants for intervention with respect to the questions presented by the petition for a writ of certiorari and by the Brief for Petitioner has been fully set forth in "Brief of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., as *Amici Curiae*" filed herein on February 21, 1957, with the consent of all the parties. The applicants for intervention are content to have said brief stand as their brief on the merits should they be permitted to intervene, but desire leave to file a reply brief to deal with the Board's suggestion that a remand to the Board may be in order and also desire leave to present oral argument with as much time allotted to their defense of the Board's order as is granted in the aggregate to the parties who contend that the Board's order should be set aside.

7. We have been unable to find any comparable case in which the Board was arguing in the courts that its

own order dismissing a complaint was invalid and should be set aside. Even where the Board was defending its own dismissal order the successful respondent before the Board has on occasion been permitted to intervene in the courts to support the dismissal. *Charles Albrecht* v. *N.L.R.B.*, 7 Cir., 1950, 181 F. 2d 652, 653; *American Newspaper Publishers Association* v. *N.L.R.B.*, 7 Cir., 1951, 190 F. 2d 45, 49, certiorari denied, 344 U.S. 812; *Jacobsen* v. *N.L.R.B.*, 3 Cir., 1941, 120 F. 2d 96, 97. Cf. *Morris* v. *S.E.C.*, 2 Cir., 1941, 116 F. 2d 896, 897-898; *Tatum* v. *Cardillo*, S.D. N.Y., 1951, 11 F.R.D. 585. The question does not seem to have arisen often because the party who was a respondent before the Board is usually named as a party respondent along with the Board in a petition to review a dismissal order. *Hicks* v. *N.L.R.B.*, 4 Cir., 1939, 100 F. 2d 804; *M.E.B.A.* v. *N.L.R.B.*, 3 Cir., 1953, 202 F. 2d 546, certiorari denied, 346 U.S. 819.

8. Warehousemen Local 206, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Joint Council of Drivers No. 37 and Teamsters Building Association, Inc., filed a motion for leave to intervene in the court below on September 20, 1955, alleging that they had "an interest in the above case and in fact are real parties at interest."[2] A "Consent of Petitioner and Respondent to Intervention in Instant

[2] The statement which we made in our brief *amici curiae* (p. 2) filed in this Court that six of the *amici curiae* applied for leave to intervene in the court below is apparently in error for the records of the court below show such an application only by the three. The six did join in the brief *amici curiae* filed below. There is no difference so far as jurisdictional issues are concerned between the three who did apply to intervene below and the three who did not but merely joined in filing an *amici curiae* brief.

Proceeding by Warehousemen Local 206, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Joint Council of Drivers No. 37 and Teamsters Building Association, Inc." signed by counsel for the petitioner, Office Employes International Union Local No. 11 and by counsel for the National Labor Relations Board was filed in the court below on September 27, 1955. The court below in a *per curiam* order filed on October 7, 1955 denied the motion for leave to intervene "it appearing that movants have not made a sufficient showing of interest to justify their status as parties. The order granted "movants" the right to appear as *"amicus curiae."* A brief *amici curiae* was filed in the court below on behalf of all the applicants for intervention except the Oregon Teamsters' Security Plan Office and William C. Earhart, administrator thereof. The National Labor Relations Board argued vigorously in support of its order in the court below and was successful in having it affirmed.

9. Although we believe that the court below was in error in denying the motion for leave to intervene there, no petition for a writ of certiorari to review that order was sought. In view of the ultimate action of the court below in affirming the Board's order, a petition to review that court's denial of "intervention would have been an idle gesture" (*Allen Calculators, Inc.* v. *National Cash Register Co.*, 1944, 322 U.S. 137, 142), except as it might have been relevant to the status of the applicants for intervention in this Court in the contingency that it granted a petition for a writ of certiorari to review the judgment below, as has now occurred. The failure to apply for certiorari should

not prejudice the present motion for leave to intervene here. To hold that it did would impose on all unsuccessful applicants for intervention the burden of seeking review of the denial of their application whenever there exists a theoretical possibility of review in this Court of the case on the merits. Moreover, the motion to intervene in this Court rests on a new ground not available in the court below in that at no time prior to the filing of the Board's brief in this Court on February 21, 1957, did applicants have any reason to suspect that the Board instead of defending its order would suggest that it would be appropriate for this Court to set aside the Board's order and remand to the Board for further proceedings if this Court agrees with the Board that Member Murdock rested his concurrence on an erroneous ground.

10. Since both of the parties before this Court take the position that it would be appropriate for this Court to set aside the Board's order, and both parties are arguing in opposition to Board Member Murdock's determination that none of the applicants for intervention is an employer (R. 236a-239a), the applicants for intervention in their capacity as *amici curiae* have no party on their side to whom they can appropriately apply for a share in oral argument. The shortness of the time already allotted to each party due to the placing of the instant case on the summary docket, makes it most unlikely that any of the parties could appropriately be expected to share their oral arguments with *amici curiae* whose views were diametrically opposed to their own in so many basic respects as obvously appears by a comparison of the brief *amici curiae* already filed herein by the applicants

for intervention, with the briefs filed herein by petitioner and the Board.

For the foregoing reasons it is respectfully urged that this motion for leave to intervene as parties in support of the judgment below be granted, with leave to file a reply brief and present an oral argument under an assignment of time in which the amount of time allotted for defense of the Board's order is equal to that granted to the parties who would have the Board's order set aside. If such leave is denied, or action thereon deferred until the decision of the case on the merits, it is respectfully urged that leave to file a reply brief as *amici curiae* and to present such oral argument as *amici curiae* be granted to the applicants for intervention.

Respectfully submitted,

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